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Chin Sau Min & Anor v Sia Sung Ho & Anor

HIGH COURT (KUCHING) — SUIT NO–22–46 OF 2005 I
CLEMENT SKINNER J
15 JUNE 2005

B

Civil Procedure — Injunction — Injunction to restrain dealing with land — Whether serious issues to be tried — Whether damages adequate remedy — Hardship to defendants and plaintiffs considered — Whether injunction should be granted

C The plaintiffs were the proprietors of a wholesale and retail grocery business run from the ground floor of their rented shophouse ('the shophouse'), belonging to their landlords ('the defendants'). The plaintiffs had been renting the shophouse from the defendants since March 2001. In March 2004, the plaintiffs entered into negotiations with the defendants to purchase the shophouse. As a result, D an oral agreement was arrived at whereby the defendants agreed to sell and the plaintiffs agreed to purchase the whole of the shophouse. According to the plaintiffs the first defendant informed them that their rental for the ground floor of the shophouse would be reduced by half to RM1,250 commencing from July 2004 when the instalment payments towards 20% of the purchase E price commenced.

The plaintiffs alleged that from July 2004 onwards they paid the reduced rentals to the defendants which were all accepted until 31 January 2005 when the first defendant wrote to say that the full rental was payable. The plaintiffs F decided then it was unsafe to make further instalment payments of the 20% deposit to the defendants unless the defendants produced the formal agreements for execution as promised. By December 2004, the plaintiffs had already paid RM120,000 towards the purchase price for the shophouse but the defendants had not produced the formalised agreements for execution. The plaintiffs claimed that they were hopeful that by withholding further payment towards G 20% of the purchase price, the defendants would be moved into producing the agreements for execution.

The defendants' stand was that tenancy was terminated by the defendants' letter of 21 March 2005 as the plaintiffs had defaulted in their rental payments H when the plaintiffs stopped the last two instalments towards the 20% down payment of the purchase price for the shophouse and thus the defendants were entitled to revert to the monthly rental of RM2,500 for the ground floor of shophouse.

I The plaintiffs therefore applied inter partes for an injunction restraining the defendants from selling or otherwise dealing with the shophouse, or from entering or retaking possession of the ground floor of the same from the plaintiffs.

Held, allowing the plaintiffs' application with costs:

(1) On the totality of the facts placed before the court, bona fide serious issues had been disclosed which require to be tried. These issues revolve around two main questions, namely, whether the plaintiffs were entitled to specific performance of the oral sale and purchase agreement entered into with the defendants in respect of the shophouse, and, whether or not the defendants had lawfully terminated the plaintiffs' tenancy of the ground floor of the shophouse, or put in another way, were the defendants entitled to rely on the plaintiffs' failure to settle the full rental for the ground floor of the shophouse, to terminate the tenancy agreement by which the plaintiffs assert a right to occupy the ground floor of the shophouse until March 2007. These two questions in turn gave rise to several subsidiary or related issues for trial (see para 39).

(2) Damages would not be an adequate remedy for the plaintiffs if they were to finally succeed in their action for specific performance or if they have to give up possession but eventually succeed in their challenge to the early termination of their tenancy to the ground floor of the shophouse (see para 41). If the plaintiffs lose the protection of the injunction and were evicted from the ground floor of the shophouse, they stand in real danger of losing their grocery store business altogether (see para 43). It would certainly cause undue hardship, inconvenience, disruption and possibly even to a curtailment or trimming down of their business if the plaintiffs were expected to operate their expanded business from only one ground floor unit when they have since the year 2002 been doing so from two ground floor units. The loss caused by this disruption, inconvenience and possible curtailment to their business was not easily quantifiable (see para 44).

(3) However, if the defendants were to succeed at trial, damages would be an adequate remedy for any loss suffered by them by the grant of an injunction. Their loss was purely financial and quantifiable. With regard to the plaintiffs' ability to meet their undertaking in damages, the plaintiffs were running a business which, by all accounts, was doing very well. For present purposes, since the plaintiffs seriously dispute the defendants' imputation about why the last two instalments were not paid and it was not appropriate for the Court to make any finding on this point at this stage of the proceedings, the plaintiffs' undertaking in damages had not been adversely affected by their not having paid the last two instalments of the 20% down payment of the purchase price (see para 46).

(4) Despite the defendants' knowledge about the plaintiffs' stand on executing the sale and purchase agreement and maintaining their tenancy of the ground floor of the shophouse, the defendants were nevertheless willing to proceed to sign the tenancy agreement with Warisan Gunung Emas. The defendants were clearly in a position to avoid any hardship they

now complain about by taking the prudent step of disclosing to Warisan Gunung Emas the presence and position of the plaintiffs. If they did not do so then it would not be unreasonable to say, that the defendants were the authors of their own misfortune (see para 54).

[**Bahasa Malaysia summary**

Pihak plaintif adalah tuanpunya perniagaan jualan borong dan barang runcit dari tingkat bawah rumah kedai sewa mereka ('rumah kedai tersebut'), milik tuan rumah mereka ('pihak defendan'). Pihak plaintif telah menyewa rumah kedai tersebut daripada pihak defendan sejak bulan Mac 2001. Dalam bulan Mac 2004, pihak plaintif telah berunding dengan pihak defendan untuk membeli rumah kedai tersebut. Hasil daripada itu, satu perjanjian lisan telah dibuat yang mana pihak defendan bersetuju untuk menjual dan pihak plaintif bersetuju untuk membeli keseluruhan rumah kedai tersebut. Menurut pihak plaintif, defendan pertama memaklumkan kepada mereka bahawa sewa mereka untuk tingkat bawah rumah kedai itu akan dikurangkan kepada separuh harga iaitu RM1,250 mulai bulan Julai 2004 apabila bayaran ansuran untuk 20% daripada harga belian bermula.

Pihak plaintif mengatakan bahawa daripada bulan Julai 2004, mereka membayar sewa yang dikurangkan kepada pihak defendan yang kesemuanya telah diterima sehingga 31 Januari 2005 apabila defendan pertama mengutus surat mengatakan bahawa sewa penuh perlu dibayar. Pihak plaintif memutuskan pada saat itu ia tidak selamat untuk membuat bayaran ansuran seterusnya, 20% daripada deposit kepada pihak defendan kecuali jika pihak defendan mengemukakan perjanjian rasmi untuk penyempurnaan yang dijanjikan. Menjelang bulan Disember 2004, pihak plaintif telahpun membayar RM120,000 daripada harga belian untuk rumah kedai tersebut tetapi pihak defendan tidak mengemukakan perjanjian yang rasmi untuk pembayaran itu. Pihak plaintif menyatakan bahawa mereka berharap dengan tidak membuat bayaran seterusnya terhadap 20% daripada harga belian itu, pihak defendan akan terdesak untuk mengemukakan perjanjian untuk pelaksanaan seterusnya.

Pendirian pihak defendan adalah bahawa penyewaan tersebut telah tamat dengan surat pihak defendan bertarikh 21 Mac 2005 kerana pihak plaintif telah gagal dalam bayaran sewa mereka apabila pihak plaintif berhenti membuat dua ansuran terakhir terhadap 20% bayaran muka daripada harga belian untuk rumah kedai tersebut dan oleh itu pihak defendan berhak untuk kembali kepada sewa bulanan RM2,500 untuk tingkat bawah rumah kedai tersebut. Pihak plaintif oleh demikian memohon *inter partes* untuk satu injunksi menghalang pihak defendan daripada menjual atau sebaliknya berurusan dengan rumah kedai tersebut, atau daripada memasuki atau mengambil balik milikan tingkat bawah itu daripada pihak plaintif.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Berdasarkan keseluruhan fakta yang dikemukakan di hadapan mahkamah, persoalan *bona fide* yang serius telah didedahkan yang perlu dibicarakan. Persoalan-persoalan tersebut berkisar dua persoalan utama, iaitu, sama ada pihak plaintif berhak kepada perlaksanaan spesifik terhadap perjanjian lisan jualbeli yang dimasuki antara pihak defendan berhubung rumah kedai tersebut, dan sama ada atau tidak pihak defendan dengan sah menamatkan penyewaan tingkat bawah rumah kedai pihak plaintif, atau dalam erti kata lain, sama ada pihak defendan boleh bergantung kepada kegagalan pihak plaintif dalam menyelesaikan sewa penuh untuk tingkat bawah rumah kedai tersebut, untuk menamatkan perjanjian penyewaan yang mana pihak plaintif menegaskan mempunyai hak untuk menetap di tingkat bawah rumah kedai tersebut sehingga bulan Mac 2007. Kedua-dua persoalan menimbulkan beberapa persoalan sampingan atau berkaitan untuk dibicarakan (lihat perenggan 39).

(2) Ganti rugi bukan satu remedi yang mencukupi untuk pihak plaintif jika mereka akhirnya berjaya dalam tindakan mereka untuk perlaksanaan spesifik atau jika mereka perlu melepaskan milikan akhirnya dalam cabaran mereka berhubung penamatan awal penyewaan tingkat bawah rumah kedai tersebut (lihat perenggan 41). Jika pihak plaintif tidak mendapat perlindungan injunksi dan dihalau keluar daripada tingkat bawah rumah kedai tersebut, mereka berada dalam keadaan berbahaya untuk kehilangan perniagaan kedai runcit mereka (lihat perenggan 43). Ini pasti akan mengakibatkan kesukaran yang tidak wajar, ketidakselesaan, gangguan dan mungkin penyesuaian atau pengecilan perniagaan mereka jika pihak plaintif diharapkan untuk menjalankan perniagaan mereka yang berkembang hanya dari satu unit tingkat bawah yang mana mereka telah pun sejak tahun 2002 berniaga dari dua unit tingkat bawah. Kerugian yang disebabkan oleh gangguan, ketidakselesaan, dan mungkin pengecilan perniagaan mereka tidak mudah untuk dikira (lihat perenggan 44).

(3) Namun begitu, jika pihak defendan berjaya dalam perbicaraan, ganti rugi adalah satu remedi yang mencukupi untuk apa-apa kerugian yang dialami oleh mereka dengan memberikan satu injunksi. Kerugian mereka adalah dari segi kewangan dan boleh dikira. Berhubung kemampuan pihak plaintif untuk mendapat ganti rugi, pihak plaintif menjalankan satu perniagaan yang, dari semua segi, berjalan lancar. Bagi tujuan ini, memandangkan pihak plaintif dengan serius mempertikaikan pengataan pihak defendan tentang kenapa dua ansuran terakhir tidak dibayar dan ia tidak sesuai untuk mahkamah membuat apa-apa penemuan berkaitannya di peringkat prosiding ini, pihak plaintif mengenai ganti rugi tidak terjejas oleh sebab mereka tidak membayar dua ansuran terakhir 20% daripada bayaran muka harga belian (lihat perenggan 46).

(4) Meskipun pengetahuan pihak defendan tentang pendirian pihak plaintif berhubung perjanjian jualbeli dan mengekalkan penyewaan tingkat bawah rumah kedai mereka, pihak defendan bersedia untuk meneruskan penandatanganan perjanjian penyewaan dengan Warisan Gunung Emas. Pihak defendan dengan jelas berada dalam kedudukan untuk mengelak apa-apa kesukaran yang mereka sekarang adukan dengan mengambil langkah yang sewajarnya iaitu mendedahkan kepada Warisan Gunung Emas kedudukan sebenar pihak plaintif. Jika mereka tidak berbuat demikian maka ia adalah munasabah untuk mengatakan, bahawa pihak defendan adalah penyebab kesusahan mereka sendiri (lihat perenggan 54).]

Notes

For cases on injunction to restrain dealing with land, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2581–2582.

Cases referred to

Brinks's Mat Ltd v Elcomber [1988] 1 WLR 1350 (refd)
Cheng Hang Guan v Perumahan Farmlim (Penang) Sdn Bhd [1988] 3 MLJ 90 (refd)
Garden Cottage Foods Ltd v Milk Marketing Board [1984] AC 130 (refd)
Keet Gerald Francis Noel John v Mohd Noor @ Harun Bin Abdullah & Ors [1995] 1 CLJ 293 (refd)
Tenaga Nasional Bhd v Dolomite Industries Park Sdn Bhd [2000] 1 CLJ 695 (refd)
Yeoh Kee Ann v PI Capital Asset Management Sdn Bhd [2000] 4 MLJ 508 (refd)

Legislation referred to

Specific Relief Act 1950 s 11(2)

Chen Chieng Ning (Chen Chieng Ning Advocates) for the plaintiffs.
Chan Cheng San (Chan & Chan Advocates) for the defendants.

Clement Skinner J:

[1] This is the *inter-partes* hearing of the plaintiffs' application for an injunction to restrain the defendants from selling or otherwise dealing with a four story intermediate shophouse situated at Jalan Setia Rajah Kuching, described as Lot 10513, Block 11, Muara Tebas Land District ('the said shophouse'), or from entering or retaking possession of the ground floor of the same from the plaintiffs. The precise terms of the plaintiffs' claim for injunctive relief are to restrain the defendants by themselves, their servants workers or agents or otherwise howsoever from:

(i) selling, disposing or otherwise dealing with all that parcel of land together with a four (4) storey intermediate shophouse erected thereon and appurtenances thereof situated at Jalan

Setia Raja, Kuching containing an area of 111.2 square metres, more or less and described as Lot 10513, Block 11, Muara Tebas Land District ('the said shophouse');

(ii) entering, taking forcible possession or otherwise evicting the plaintiffs from the ground floor of the said shophouse;

(iii) doing or committing any action whatsoever and howsoever such as to interfere with the plaintiffs' peaceful and quiet enjoyment on the ground floor of the said shophouse;

(iv) doing or committing any action whatsoever and howsoever such as to disrupt the plaintiffs' grocery store business on the ground floor of the said shophouse;

(v) harassing, disturbing or threatening the plaintiffs from residing and doing business on the ground floor of the said shophouse; and

(vi) doing or giving any direction and/or causing any person or persons to use and cause violence to be committed against the plaintiffs and their families until the final disposal of this action and/or further order of this court.

[2] On 25 April 2005 I granted the plaintiffs an interim injunction in the above terms on the hearing of their *ex-parte* application which came before me on a certificate of urgency. I also ordered then that the *inter-partes* hearing of their application be held on 12 May 2005. This is the hearing of that application.

[3] The brief facts giving rise to the plaintiffs' application are these.

[4] The plaintiffs are husband and wife. They are the proprietors of a wholesale and retail grocery business run under the name and style of 'Maggie Eco Mart'; from the ground floor of the said shophouse. The defendants are brothers. They are the beneficial owners of the said five shophouse, which is an intermediate lot within a row of nine units of four storey shophouses all owned by the defendants. There are two other rows of shophouses in the vicinity of the row of shops owned by the defendants. The row owned by the defendants is known as Block 'B' while the other two rows are Block 'A' and Block 'C' respectively.

[5] The plaintiffs allege that at all material times the first defendant held himself out as representing both the defendants in their dealings with the plaintiffs. This is not denied by the first defendant who says he holds a power of attorney from the second defendant to deal with the said shophouse.

[6] Some time in March 2001 the plaintiffs rented the ground floor of the said shophouse for a period of three years from 1 April 2001 to 31 March 2004 at a monthly rent of RM2,500, with an option to renew for a further two years at an increased rent. This initial letting was evidenced by an undated tenancy agreement signed by the first plaintiff and the first defendant. The

plaintiffs say that before entering into the initial letting and commencing their business from the said shophouse, they conducted a survey of the areas around Kuching and were convinced that the location the said shophouse, being located along the corridor to Kota Samarahan, held good potential for growth. According to the plaintiffs, when they started their grocery business there in March 2001, there were no other grocery stores of their size in the vicinity; a supermarket called 'Choice Daily' opened a year later and until the Everise Department Store opened at Desa Ilmu two years later, they were the only grocery store en route to Kota Samarahan.

[7] Since commencing their business the plaintiffs say they have succeeded in attracting a growing number of retail shoppers from the area around Tabuan Stutong/Tabuan Laru/Kota Samarahan; their customers include residents, factory workers and students who purchase their daily needs from them. Further, due to the said shophouse's proximity to the Sama Jaya Free Industrial Zone and the two universities at Kota Samarahan, namely, UNIMAS and UITM as well as the new UNIMAS site, the plaintiffs say they have also managed to penetrate into the wholesale market by supplying groceries in volume to these organisations. According to the plaintiffs during term time they supply UITM on average RM500 worth of groceries per day, and during its peak of construction they supplied the four canteens at the new UNIMAS site on average RM10,000 worth of groceries. In addition the plaintiffs also supplied groceries to electronic factories in the area such as First Silicon, Taiyo Yuden, Komag and Toko. In support of their assertion that their grocery business has flourished and grown from day one, the plaintiffs exhibited their balance sheet and profit and loss account for 'Maggie Eco Mart' for the years 2001, 2002 and 2003.

[8] On 22 March 2004, the plaintiffs entered into an agreement with the first defendant to renew their tenancy of the ground floor of the said shophouse for a further three years commencing April 2004 at a monthly rent of RM2,500. In the same agreement the plaintiffs also rented the ground floor of the neighbouring shophouse known as 'sub lot 14' for a monthly rental of RM1,500 effective May 2004.

[9] At around the time their tenancy agreement for the ground floor was renewed in March 2004, the plaintiffs say they also entered into negotiations, at the initiation of the first defendant, to purchase the said shophouse from the defendants. As a result, an oral agreement was arrived at whereby the defendants agreed to sell and the plaintiffs agreed to purchase the whole of the said shophouse on the following essential terms:

(1) The purchase price was RM830,000 and was payable as follows:

1.1 twenty percent (20%) of the purchase price amounting to RM166,000 was to be paid in the following manner:

(a) RM10,000 to be paid forthwith as a booking fee;

(b) the remaining RM156,000 to be paid by way of six (6) monthly instalments of RM22,000 each and one final instalment of RM24,000, each payable at the end of the month commencing from July 2004;

1.2 the remaining eighty percent (80%) of the purchase price shall be settled as soon as possible and in any event, within three (3) months from the date of the last monthly instalment by way of a bank loan to be obtained by the plaintiffs.

(2) Vacant possession of the said shophouse shall be given to the plaintiffs upon full payment of the purchase price.

[10] To encourage them to purchase the said shophouse, the plaintiffs say the first defendant had during negotiations also offered to assist them in three further ways, namely, by helping to obtain approval for a bank loan to finance the balance of the purchase price; to make use of his lawyers to prepare the documentation for the transaction; and if the plaintiffs agreed to purchase the said shophouse, to reduce the monthly rental by half in respect of the ground floor.

[11] The plaintiffs say they accepted the above offers and relying on an assurance by the first defendant that he would engage a lawyer to formalise the oral agreement as soon as possible, they issued, at the request of the first defendant, a cheque in payment of the RM10,000 booking fee and seven post-dated cheques for the following amounts:

(1) 30 July 2004 for RM22,000

(2) 30 August 2004 for RM22,000

(3) 30 September 2004 for RM22,000

(4) 30 October 2004 for RM22,000

(5) 30 November 2004 for RM22,000

(6) 30 December 2004 for RM22,000

(7) 30 January 2005 for RM24,000

[12] The plaintiffs further allege that one week after the above cheques were handed to the first defendant, he informed them that two agreements would be prepared by his lawyer to formalise the oral agreement; one in respect of the instalment payments and the other in respect of the sale and purchase of the said shophouse, but both would be prepared as soon as possible. According to the plaintiffs the first defendant also informed them that their rental for the ground floor of the said shophouse would be reduced by half to RM1,250 commencing from July 2004 when the instalment payments towards 20% of the purchase price commenced.

[13] The plaintiffs say that from July 2004 onwards they paid the reduced rentals to the defendants which were all accepted until 31 January 2005 when the first defendant wrote to say that the full rental was payable. The plaintiffs say this change of heart by the defendants in 5 January 2005 coincided with certain other events that were occurring about that time. The plaintiffs say that after their post-dated cheques for July, August and September 2004 had been cleared by the defendants and there was still no sign of the two agreements for execution, they began to worry about their position. So they approached the first defendant to enquire about the agreements whenever he came to their grocery store but according to the plaintiffs, the first defendant kept saying he was too busy and that he would contact them. The plaintiffs say they even approached the first defendant's son about the agreements when the latter came to the shophouse to collect the rentals, but there was no response from the first defendant.

[14] After their next two post-dated cheques for October and November, 2004 were cleared for payment by the bank, but there was still no written agreements produced for execution by the defendants, the plaintiffs became very concerned about their position and sought legal advice from their former solicitors. On being advised of their position the plaintiffs decided it was unsafe to make further payments to the defendants unless the defendants produced the formal agreements for execution as promised. By then it was December 2004 and they (the plaintiffs) had already paid RM120,000 towards the purchase price for the said shophouse but the defendants had not produced the formalised agreements for execution. The plaintiffs say they were hopeful that by withholding further payment towards 20% of the purchase price, the defendants would be moved into producing the agreements for execution.

[15] Accordingly the plaintiffs decided to withhold payment on their last two post-dated cheques until the formalised agreements were presented for execution and to inform the defendants of their decision. However, the plaintiffs say that after instructing their bank to stop payment, they were unable to inform the defendants of their action as the first defendant would not answer their telephone calls although they did see him at the coffee shop next to their grocery store.

[16] The plaintiffs say that the first indications that the defendants were trying to back out of the sale of the said shophouse came towards the end of January 2005 with the unfolding of the following events:

(a) by letter dated 31 January 2005, the defendants claimed that the plaintiffs had short-paid the rental for the ground floor since July 2004. The plaintiffs point out however, that the defendants had been issuing them with receipts for the payment of the reduced rentals since July 2004 without any protest;

(b) after the defendants' letter of 31 January 2005 the first defendant ceased to continue his usual practice of collecting the rentals from the plaintiffs and has not done so for February, March and April 2005;

(c) by letter dated 21 February 2005, the defendants terminated the plaintiffs' tenancy of the ground floor to the neighbouring sub lot 14 for the ostensible reason that it was needed for their 'own usage in the upcoming months';

(d) on or about 28 February 2005 the first defendant handed the plaintiffs a letter from RHB Bank informing them that their application for a loan to finance the purchase of the said shophouse was rejected;

(e) the plaintiffs then engaged the services of their present lawyers who, on 28 February, 2005 wrote to the defendants, demanding that the agreements be formalised;

(f) the plaintiffs' lawyers were informed by the first defendant to deal directly with the latter's lawyers;

(g) by letter dated 3 March 2005 the plaintiffs' lawyers forwarded a copy of a sale and purchase agreement to the defendants' lawyers for the defendants' execution;

(h) by a letter dated 7 March 2005 the defendants' lawyers replied stating that since the plaintiffs had defaulted in the last two instalment payments towards 20% of the purchase price, the plaintiffs' request to formalise the sale and purchase agreement was out of the question;

(i) on 21 March 2005 the plaintiffs' lawyers replied denying any default on the plaintiffs' part and explaining the circumstances leading to the last two instalment payments being withheld and informing the defendants that the plaintiffs were ready and willing to complete the sale of the said shophouse;

(j) on the same day, by letter dated 21 March 2005, which the first defendant delivered to the plaintiffs' son, the defendants terminated the tenancy of the plaintiffs to the ground floor of the said shophouse and required vacant possession to be delivered up on 30 April 2005, with the premises restored to its original state. The plaintiffs' tenancy was terminated for their alleged default in rental payments;

(k) by letters dated 24 March 2005 and 1 April 2005 respectively, the defendants' lawyers wrote to the plaintiffs' lawyers stating in effect that the defendants were not willing to complete the sale of the said shophouse and that they (the defendants) were entitled to forfeit all sums paid towards the purchase of the

same, but were prepared to consider refunding the RM120,000 paid by the plaintiffs if they delivered vacant possession of the ground floor on 30 April 2005.

[17] The plaintiffs say that after their application for a loan was rejected by RHB bank, they applied for and were approved a loan from Malayan Banking Berhad to finance the purchase the said shophouse, vide the bank's letter of 29 March 2005.

[18] On 31 March 2005 the plaintiffs lodged a caveat against the said shophouse, which was duly registered at the Kuching Land Registry Office on 14 April 2005.

[19] On 11 April 2005 the plaintiffs received a letter personally delivered by the first defendant, reminding the plaintiffs to deliver vacant possession of the ground floor of the said shophouse by 30 April 2005 as the defendants did not want to encounter 'any losses in the process of our progressive renovation works carried out by our contractor in accordance with our specific time frame period', and informing the plaintiffs that they would be held responsible for any delay to such works. By this time, the plaintiffs say they noticed that renovation works had commenced to the shophouses adjoining on either side of their grocery store, with the common walls between the shops being knocked down. The plaintiffs say they had no means of knowing whether the defendants had sold or rented out the entire block of shops including the said shophouse.

[20] On 19 April 2005 the plaintiffs cpmmenced this action and on 25 April 2005 was granted the injunctive relief they sought on ex-parte basis.

[21] The defendants oppose the plaintiffs' inter-partes application and request that the ex-parte interim injunction be dissolved forthwith. In doing so they have given their version of the events leading to this application.

[22] The defendants do not deny that the plaintiffs have been tenants of the ground floor of the said shophouse since March 2001 and that their tenancy was extended in March 2004 for a further 3 years until April 2007 at the rent of RM2,500 per month. The defendants also do not deny that on the plaintiffs agreeing to purchase the whole of the said shophouse, the first defendant agreed to reduce the rental for the ground floor of the said shophouse by half to RM1,250 per month commencing from July 2004, but the defendants say that such reduction was subject to the proviso 'that the transaction was successfully closed' (quoting the first defendant's own words used in para 18 (k) of his affidavit of 9 May 2005).

[23] As far as the plaintiffs' tenancy of the ground floor is concerned, the defendants' stand is that it has been terminated by the defendants' letter of 21 March 2005 as the plaintiffs had defaulted in their rental payments. According to the first defendant the plaintiffs had so defaulted because once the plaintiffs stopped the last two instalments towards the 20% down payment of the

purchase price for the said shophouse, they (the plaintiffs) had breached their agreement to purchase the same and 'I was also entitled to revert to the monthly rental of RM2,500 for the Ground Floor of the said Sub lot 13, as stated in my letter of 31 January 2005 to the first plaintiff (exhibit CSW-14)'. (See para 20 (k) of the lsl defendant's affidavit of 9 May 2005).

[24] The plaintiffs dispute the defendants' right to terminate their tenancy and say that what the first defendant said in para 19 (k) of his affidavit about the reduction in rental being subject to 'the transaction being successfully closed', was the first occasion on which they have ever heard of such a condition.

[25] For present purposes, although I must refrain from expressing any view on this issue ie of the defendants' rights to terminate the plaintiffs' tenancy of the ground floor of the said shophouse which is now seriously in dispute, I should point out that if the defendants' letter of 31 January 2005 (CSM-14) is referred to, it makes no mention at all of the defendants' alleged right to revert to the original monthly rental or of the plaintiffs' alleged breach of their agreement to purchase the said shophouse, which in turn allegedly gave rise to the defendants' right to revert to the original monthly rentals.

[26] With regard to the oral agreement for the sale of the said shophouse to the plaintiffs, the defendants do not deny that such an agreement was concluded between the parties or that the purchase price of RM830,000 was to be paid in the manner described by the plaintiffs, but the difference between the two parties regarding this transaction centres around the time when the formal sale and purchase agreement was to be signed, and how many agreements were to be signed.

[27] The defendants' version of this particular part of the transaction is given by the first defendant who says that during the initial stage of negotiations, he told the first plaintiff that since he (the first plaintiff) proposed to pay the 20% down payment by instalments, two agreements might be required, one for the 20% down payment and the other the formal Sale and Purchase Agreement, but after the first plaintiff tendered 10 the post-dated cheques for the seven instalment payments, there was no longer any need for two agreements because for each cheque that was cleared he (first defendant) would issue a receipt and when all the postdated cheques were cleared, then the Sale and Purchase Agreement would be signed.

[28] The first defendant admits that after the first three cheques had cleared the first plaintiff did ask him about the agreement, but he maintains he informed the first plaintiff that although the lawyers had prepared the Sale and Purchase Agreement, that the plaintiffs were only entitled to sign it when all the post-dated cheques had cleared.

[29] As far as the oral agreement is concerned, it is the defendants' stand that when the plaintiffs' stopped payment on the last two instalments towards

20% of the purchase price, the plaintiffs had breached the oral agreement and were unable to fulfil their obligations under the same as they were not financially sound.

[30] The plaintiffs dispute the defendants' version that it was a condition of the sale of the said shophouse that the formal Sale and Purchase Agreement would be signed only when all the instalment payments towards 20% of the purchase price had been paid. The defendants point out that it would be illogical for them to agree to such a condition since they needed to obtain a bank loan to pay the balance of the purchase price and without a sale and purchase agreement, financial institutions would regard their application for a loan with suspicion.

[31] The plaintiffs also deny that they were told by the first defendant that 'the lawyers' had prepared the Sale and Purchase Agreement but that it could only be signed when all the instalments had been paid, as alleged. The plaintiffs point out that if they had been so informed as alleged, they would have gone to see the lawyer so that the terms and conditions could be explained to them to ensure that its terms accorded with what had been agreed to between the parties.

[32] The plaintiffs also deny that they were unable to meet their obligations under the oral agreement due to their alleged weak financial position. The plaintiffs point out that at the point in time when they became extremely concerned at their position, they had already paid some RM120,000 to the defendants and had not defaulted in any rental payments even though such payments may have been delayed. So the plaintiffs say there is no truth in the defendants' allegations about their financial position.

[33] With regard to the renovation works to the shophouses on either side of the said shophouse, the defendants say that (and here I quote from para 21 of the first defendant's affidavit of 9 May 2005): 'As a result of the plaintiffs' default in the instalments payments and thereby their breach of the oral agreement to purchase the said Sub lot 13, I accepted an offer to let the whole row of nine (9) shophouses on sub lots 11 to 19 on Block B .... to Warisan Gunung Emas Sdn Bhd '('Warisan Gunung Emas'). The first defendant goes on in para 22 of his same affidavit to state, 'In order to deliver vacant possession of the said nine (9) shophouses on Block B to the Tenant (ie Warisan Gunung Emas), I gave notices to the several existing tenants, including the plaintiffs, to terminate their Tenancy Agreements'.

[34] It would appear from the affidavit of the first defendant that on 30 March 2005 the defendants entered into a Tenancy Agreement with Warisan Gunung Emas to let to the latter all the 9 shophouses in Block B, including the said shophouse, for a period of 3 years effective from 1 April 2005 with an option to renew for a further 3 years, and that Warisan Gunung Emas has begun renovation works to the 9 shophouses since 1 April 2005.

[35] The affidavit evidence shows that Warisan Gunung Emas has in turn on 11 May 2005 entered into a Tenancy Agreement with an entity known as 'Tim Nukleus Agensi Penguatkuasaan Maritim Malaysia' ('the Maritime Agency') whereby all the 9 shophouses in Block B, including the said shophouse, has been let to the Maritime Agency for a period which is not disclosed. According to the first defendant, he has been informed by Warisan Gunung Emas that the Maritime Agency will move in and occupy all the 9 shophouses in Block B once the renovations are completed, and fence up the whole block for security reasons. Apparently the Maritime Agency is a body set up by the Federal Government for the costal security of Sarawak, and other parts of Malaysia.

[36] The defendants say that the plaintiffs' application for injunction should be refused and the ex-parte interim injunction granted to them should be dissolved forthwith for the following reasons:

(a) that because of the plaintiffs' refusal to surrender vacant possession of the ground floor of the said shophouse, Warisan Gunung Emas has been unable to complete renovation works to the ground floors of Block B, and has indicated that they will claim damages from the defendants for such delay;

(b) the first defendant says he fears that Warisan Gunung Emas may terminate their tenancy agreement if the ground floor of the said shophouse continues to be occupied by the plaintiffs and the interim injunction is not dissolved;

(c) that the first defendant will face financial ruin if the interim injunction is not dissolved and the plaintiffs allowed to remain in occupation, as he will be exposed to paying huge damages if Warisan Gunung Emas terminates its tenancy;

(d) that the plaintiffs obtained the interim injunction to serve a collateral purpose, namely, to exert pressure on the first defendant to pay them compensation before they surrendered vacant possession of the ground floor of the said shophouse knowing that, with the interim injunction in place, the renovation works to all the 9 shophouses cannot be completed, thereby exposing him to paying compensation to Warisan Gunung Emas;

(e) since the plaintiffs have lodged a caveat against the said shophouse, their claim to a beneficial interest therein is adequately protected without the need for further protection by way of an injunction;

(f) if the interim injunction is dissolved and the plaintiffs should eventually succeed in their claim for wrongful termination of the tenancy agreement in respect of the ground floor of the said shophouse, damages would be an adequate remedy since their claim can be quantified and the first defendant is financially able to meet such damages;

(g) pending the trial of their action the plaintiffs have an alternative place to go to, namely, the ground floor of Sub lot 27 in Block C or any other available ground floor units in that Block where their customers will have no difficulty finding them;

(h) that the plaintiffs had, when making their ex-parte application for injunction, failed to make full and fair disclosure in respect of the following matters:

1 that in respect of their application to restrain the defendants from selling or dealing with the said shophouse, the plaintiffs had:

1.1 failed to disclose the 'true reason' why they stopped payment on the last two post-dated cheques, which the defendants contend was because the plaintiffs had insufficient funds in their account;

1.2 deliberately failed to exhibit their Public Bank Statement of Account for the month of January 2005 so as to mislead the Court;

1.3 failed to inform the Court that their caveat against the said shophouse was similar in effect to an injunction; and

2 that in respect of their application to restrain the defendants from forcibly taking possession or evicting them from the ground floor of the said shophouse, the plaintiffs had:

2.1 failed to disclose that by 14 March 2005 they were in occupation of an alternative shop lot, namely, the ground floor of Sub lot 27 of Block C and, therefore, had misled the Court to believe that the plaintiffs have no alternative place to move their store to.

[37] Before turning to consider the merits of the plaintiffs' application and the submissions of the parties, this is an appropriate place to state the approach I intend to take in deciding this application. That approach is set out for my guidance in *Keet Gerald Francis Noel John v Mohd Noor @ Harun Bin Abdullah & Ors* [1995] 1 CLJ 293, where Gopal Sri Ram JCA, speaking for the Court of Appeal summarised the matters which a judge should have at the forefront of his mind when considering an application for injunction. This is what his Lordship said:

> [F]irst, he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of Counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry.

Second, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the Judge would be entitled to dispense with the usual undertaking as to damages (see: *Cheng Hang Guan v Perumahan Farmlim (Penang) Sdn Bhd* [1988] 3 MLJ 90). Apart from such cases, the Judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee.

Thirdly, the Judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the Judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiffs equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A Judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

[38] With that I turn to consider the application before me.

ARE BONA FIDE SERIOUS ISSUES DISCLOSED?

[39] Having read the pleadings and the affidavits filed by the parties as well as the submissions of counsel, I find that on the totality of the facts placed before me bona fide serious issues have been disclosed which require to be tried. These issues revolve around two main questions, namely, whether on the facts of this case the plaintiffs are entitled to specific performance of the oral sale and purchase agreement entered into with the defendants in respect of the said shophouse, and, whether or not the defendants have lawfully terminated the plaintiffs' tenancy of the ground floor of the said shophouse, or put in another way, were the defendants entitled to rely on the plaintiffs' failure to settle the full rental for the ground floor of the said shophouse, to terminate the present tenancy agreement by which the plaintiffs assert a right to occupy

A the ground floor of the said shophouse until March 2007? These two questions in turn give rise to several subsidiary or related issues for trial, including but not limited to whether the plaintiffs were in default of the final two instalments towards payment of 20% of the purchase price for the said shophouse, thereby breaching the oral sale and purchase agreement as alleged by the defendants B or conversely, whether the plaintiffs were justified in withholding payment of the two final instalments for the reason advanced by them, ie that the defendants had failed to have their (defendants) lawyers draw up the sale and purchase agreement in respect of the said shophouse for execution by the parties which, according to the plaintiffs, the first defendant had promised to do when the C plaintiffs handed him the booking fee and the 7 post-dated cheques, and not when all the instalments were paid as alleged by the defendants.

JUSTICE OF THE CASE

D **[40]** Having found that there are serious issues which require further investigations, I next consider where the justice of the case lies. In doing so I take into account the following matters:

WHETHER DAMAGES ARE AN ADEQUATE REMEDY?

E **[41]** I find that damages would not be an adequate remedy for the plaintiffs if they were to finally succeed in their action for specific performance or if they have to give up possession but eventually succeed in their challenge to the early termination of their tenancy to the ground floor of the said shophouse.

F **[42]** At this stage of the proceedings, the plaintiffs are entitled to rely on s 11(2) of the Specific Relief Act 1950 which states that 'unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation ...'. Quite apart from this presumption at law, here the plaintiffs have asserted that the said shophouse was selected as the place from which to run their G grocery business because of its particularly favourable location along the corridor to Kota Samarahan and its proximity to the universities and industries in the Sama Jaya Free Industrial Zone catchment area.

[43] By all accounts the plaintiffs' confidence in the particular location of the said shophouse appears to have proven good, to the extent that the H plaintiffs say they have been able to penetrate the wholesale market in the area. To cater for their flourishing and expended business the plaintiffs had even rented additional shop space from the defendants. The plaintiffs have not only invested financially in their grocery business but they also run it as a family business, with both husband and wife giving to the business their I whole effort. The said shophouse is only five minutes walk from their home, and they spend long hours there attending to the business, from 7.30 am to 9.30 pm from Monday to Saturday and from 8.30 am to 6.30 pm on Sunday

and public holidays. As counsel for the plaintiffs put it, the grocery store is fundamental to their well being. If the plaintiffs lose the protection of the injunction and are evicted from the ground floor of the said shophouse, they stand in real danger of losing their grocery store business altogether. The defendants intend to let out the said shophouse to Warisan Gunung Emas Sdn Bhd for an initial 3 years with an option to renew for a further 3 years. Given that length of time, even if the plaintiffs were eventually to succeed at trial, the loss they would have suffered from the dislocation and interruption to their business from the said shophouse would be immeasurable and difficult to quantify in terms of money as by then they would have lost custom and goodwill. They would need to start up all over again.

[44] I have not overlooked the fact that the plaintiffs are presently renting the ground floor of Sub lot 27 in neighbouring Block C, but the plaintiffs have explained that they have needed extra storage space for their businesses since the year 2002, which is why they took on rent the ground floor to Sub lot 14 as well from the defendants in the first place so that it could serve as a store. Now that the defendants have taken back the ground floor to Sub lot 14, the plaintiffs say they have had to rent the ground floor to Sub lot 27 to provide the extra storage space they much need. Accordingly, the plaintiffs say that it is not possible to operate their grocery business as well from the ground floor of Sub lot 27 of Block C because they really need two ground floors; one as a retail outlet and the other as a storage facility. I find this a reasonable explanation. In my judgment it would certainly cause undue hardship, inconvenience, disruption and possibly even to a curtailment or trimming down of their business if the plaintiffs are expected to operate their expanded business from only one ground floor unit when they have since the year 2002 been doing so from two ground floor units. The loss caused by this disruption, inconvenience and possible curtailment to their business is not easily quantifiable.

[45] While still on this subject, the defendants have also suggested that there are other ground floor units available for rent in Block C and have exhibited a photograph of two shophouses with 'For Rent' signs displayed outside them. The plaintiffs have explained that in respect of the first of such shophouses (Sub lot 21) shown in photo 'SSH20', that shophouse does not enjoy good geomancy or 'Fung Shui' for business as its entrance faces a pillar or beam (as shown in photo CSM 39). According to the plaintiffs, it is for this reason that the owner of that shophouse has affixed the symbolic 'Eight Dragon' outside the entrance to the unit. According to the plaintiffs, the 'Eight Dragon' is used by the Chinese to counter bad 'Fung Shui'. At this stage of the proceedings I am not in a position to say anything about the plaintiffs' assertion on the 'Fung Shui' of Sub lot 21. With regard to the other shophouse for rent (in photo SSH20), the plaintiffs say it is Sub lot 25 in Block C but that its location is not suitable as a grocery retail outlet. Unlike the ground floor of the said shophouse in Block B which is facing the main road, Sub lot 25 in Block C is blocked by Block A and in fact looks into the back of the shops in Block A. I agree.

[46] Turning now to the defendants' position, it is my view that if the defendants were to succeed at trial, damages would be an adequate remedy for any loss suffered by them by the grant of an injunction. Their loss is purely financial and quantifiable. The defendants are investors in real estate and there is no evidence that they require the said shophouse for their own immediate use. They hope to retake possession of the said shophouse from the plaintiffs only to let it out again to another party, albeit at a much higher rent. That difference in rental is quantifiable and the plaintiffs have given their undertaking to pay the same. With regard to their ability to meet their undertaking in damages, the plaintiffs are running a business which, by all accounts, is doing very well. There is no evidence before me to suggest that the plaintiffs will not be in a financial position to meet their undertaking in damages. This is not a case where there is evidence to suggest that the plaintiffs are in dire financial straits or facing imminent bankruptcy proceedings. On the contrary, there is evidence that the first plaintiff owns a piece of land which he has recently redeemed from Malayan Banking Berhad. Although the defendants have not questioned at all the plaintiffs' undertaking in damages, they have suggested that the reason the plaintiffs failed to pay the last two instalments towards 20% of the purchase price, was because they were financially unsound. But this is disputed by the plaintiffs who explain that they stopped payment of those last two instalments because they were worried that the defendants had not procured the formal sale and purchase agreement for execution despite having promised to do so. For present purposes, since the plaintiffs seriously dispute the defendants' imputation about why the last two instalments were not paid and it is not appropriate for the Court to make any finding on this point at this stage of the proceedings, I do not consider the plaintiffs' undertaking in damages to have been adversely affected by their not having paid the last two instalments of the 20% down payment of the purchase price.

DID THE PLAINTIFFS FAIL TO MAKE FULL AND FAIR DISCLOSURE?

[47] I do not think so and I say so for the following reasons. With regard to the allegation that the 'true reason' for the plaintiffs stopping payment on the last two post-dated cheques was because they had insufficient funds in their account, and not for the reasons given by the plaintiffs, I see nothing in the point taken. What the defendants put forward as the 'true reason' is purely their own surmise based on their knowledge about the plaintiffs' bank statement, but the plaintiffs say their bank statement is not an indication of their true financial position since they chose to operate their account by overdrawing on it at times. The plaintiffs say that a better indication of their ability to meet their financial obligations is the fact that they had never before defaulted in their previous instalment payments under the oral agreement or with the rentals to the defendants. I agree. I should also point out that at this stage of the proceedings, when I do not have the benefit of having heard all the evidence, including cross-examination on the point, I am in no position to make a finding

what the 'true reasons' were for the plaintiffs stopping payment on the last two post-dated cheques.

[48] With regard to the allegation that the plaintiffs had deliberately withheld production of their January 2005 bank statement despite saying that they would produce it in their affidavit, and that this was done to mislead the Court into granting the ex-parte injunction, I cannot agree with the defendants' accusation. It seems to me that the defendants are keen to show that the plaintiffs had deliberately suppressed their bank statement of January 2005 because if produced, it would have shown that the plaintiffs had insufficient funds in their account and had overdrawn their account many times in that month. By so showing, the defendants were hoping to demonstrate that the true reason for the plaintiffs stopping payment on the last two post-dated cheques was their weak financial position and not because they were worried about their position as purchasers. But the defendants' accusation suffers from several weaknesses: first, if the plaintiffs had intended to mislead the Court by deliberately suppressing their bank statement of January 2005 as alleged, then it makes no sense for the plaintiffs to refer to that bank statement and say that they were producing it, thereby alerting the Court to its existence. Secondly, a quick reference to the plaintiffs' other bank statements for say September, October, November and December, 2004 shows that the plaintiffs' account was also overdrawn on many occasions in those months, but the plaintiffs' post-dated cheques in those months were still good for payment. So I cannot agree with the defendants' contention that the plaintiffs had deliberately suppressed or withheld their January 2005 bank statement so as to mislead the Court as alleged.

[49] With regard to the allegation that the plaintiffs had not drawn my attention to the fact that they had lodged a caveat against the said shophouse four days before applying for the ex-parte interim injunction, and that if they had done so then the Court would have realised that it was superfluous to grant an injunction to restrain the defendants from selling or dealing with the said shophouse, since it is well accepted that the effect which a caveat has over land against which it is lodged has been likened to that of an injunction and therefore constitutes a serious fetter on a registered proprietor's rights to exercise proprietary rights over his land. I do not agree with this allegation. In the first place the plaintiffs did disclose the existence of their caveat, and my attention was drawn to it. In the second place there was no need to draw my attention to the effects which a caveat has over land against which it is lodged — I am quite aware of it. In the third place even though it is true that a caveat constitutes a serious fetter on a registered proprietor's right to exercise proprietary rights over his land, it is quite evident to me that a caveat does not, unlike an injunction, restrain an owner from dealing with his land off the register so to speak, as in the present case, by letting it out to others or taking physical possession of it, and the like. Accordingly, the first limb of the order made

against the defendants on 25 April 2005 is not superfluous or redundant as contended by the defendants.

[50] With regard to the allegation that the plaintiffs had not, when applying for their ex-parte injunction, disclosed that they had already rented Sub lot 27 in Block C and, therefore, had alternative premises to move to, I do not regard this as a material non-disclosure. In my judgment it is not every non-disclosure of facts that is fatal to a plaintiff's application for ex-parte injunctive relief. To my mind the non-disclosure must be of a material fact, and as his Lordship Ralph Gibson LJ said in *Brinks's Mat Ltd v Elcomber* [1988] 1 WLR 1350 at p 1356 'the material facts are those which it is material for the judge to know in dealing with the application as made'. Further, in *Yeoh Kee Ann v PI Capital Asset Management Sdn Bhd* [2000] 4 MLJ 508, Steve Shim J (as his Lordship then was) explained what constitutes 'material facts' in the context of an ex-parte application. His Lordship held that for undisclosed facts in an ex-parte application to be considered 'material', those facts that were not disclosed must be of such a nature that if disclosed, it was more than likely that the ex-parte order would not have been granted. I respectfully agree with what was stated by his Lordship.

[51] Reverting to the allegation of non-disclosure that has been made here, it would not have made any difference to the plaintiffs' ex-parte application if it had then been disclosed that the plaintiffs had already rented Sub lot 27 of Block C, because the plaintiffs had already from 2002 required the extra space of another ground floor unit at which to store their groceries; with the plaintiffs having to give up Sub lot 14, it is only natural to expect them to rent alternative storage premises as close by as possible. But the fact that the plaintiffs had done so does not mean that they would not suffer the hardship and loss which they say they will suffer if not granted the injunction.

DID THE PLAINTIFFS OBTAIN THE INTERIM INJUNCTION TO SERVE A COLLATERAL PURPOSE?

[52] I do not think they did. I find the defendants' allegation that the real intention behind the plaintiffs obtaining the interim injunction was to pressurise them into paying compensation to the plaintiffs to move out of the ground floor of the said shophouse not only wild, but also totally unjustified. The first defendant himself admits that after the first three post-dated cheques had cleared, the first plaintiff did ask him about the agreement (see para 19 (n) of the first defendant's affidavit of 9 May 2005). This means that from as early as October 004 the plaintiffs were interested to formalise the purchase of the said shophouse and not in compensation. The evidence also shows that despite the rejection of their application for a loan to finance the purchase of the said shophouse by RHB Bank, the plaintiffs applied for and obtained approval for a loan from Malayan Banking Bhd. If the plaintiffs were interested in compensation only and to move out, why go to the trouble of applying for a loan to purchase

the said shophouse? Further, even before the tenancy agreement was terminated, the plaintiffs had through their lawyers, on 28 February 2005 written to the defendants demanding for the sale agreement to be formalised. This again indicates that the plaintiffs were interested to formalise the agreement and not incompensation for moving out. In fact there is no evidence before the Court to show that when they made their ex-parte application, the plaintiffs knew about the tenancy agreement entered into between the defendants and Warisan Gunung Emas in respect of all the 9 shophouses in Block B. No doubt the plaintiffs knew something was happening as they could observe the renovations going on to the shophouses around them, but those renovations only commenced on 1 April 2005 and there is no evidence that they knew about the terms or extent of the letting so as to enable them to conclude that the defendants would be exposed to 'pay huge compensation' if the renovations were not completed.

THE DEFENDANTS' EXPOSURE TO SUBSTANTIAL FINANCIAL LOSSES?

[53] The defendants say that if the injunction is not dissolved and the plaintiffs do not deliver up possession of the ground floor of the said shophouse, they will be exposed to huge claims in damages from Warisan Gunung Emas, with a possibility that the tenancy agreement in respect of the 9 units of shophouses will be terminated. That may very well be so but the facts show that it is a position which the defendants were happy, indeed willing to put themselves into and they did so with eyes wide open. Therefore, having willingly run the risk of such exposure the defendants cannot be heard to complain about it. The following facts speak for themselves when considering the defendants' fears:

(1) from as early as the third instalment payment in October, 2004 the plaintiffs were enquiring after the formal agreement, which must have indicated to the defendants, if anything, that they were interested in concluding the sale;

(2) by 28 February 2005 the plaintiffs' present lawyer had already written to the defendants demanding for the oral agreement to be formalised;

(3) on 3 March 2005 the plaintiffs' present lawyer wrote to the defendants' lawyer demanding for the execution of the Sale and Purchase Agreement;

(4) by 17 March 2005 the plaintiffs' present lawyer had written to the defendants' lawyer requesting the defendants to collect the rentals as the first defendant had done in the past. Again, if anything, this letter would have indicated to the defendants that the plaintiffs were interested in maintaining their tenancy;

(5) it was only on 21 March 2005 that the defendants terminated the plaintiffs' tenancy to the ground floor of the said shophouse;

(6) in the defendants' letter of termination of 21 March 2005, although the plaintiffs were given until 30 April 2005 to deliver vacant possession, the first defendant reveals in para 24 of his affidavit of 9 May 2005, that on 30 March 2005 the tenancy agreement for all the 9 units of shophouses, including the said shophouse, had been entered into and that Warisan Gunung Emas had begun to carry out renovations from 1 April 2005.

[54] From the above facts and events, it is not difficult to see that despite the defendants' knowledge about the plaintiffs' stand on executing the sale and purchase agreement and maintaining their tenancy of the ground floor of the said shophouse, the defendants were nevertheless willing to proceed to sign the tenancy agreement with Warisan Gunung Emas. The defendants were clearly in a position to avoid any hardship they now complain about by taking the prudent step of disclosing to Warisan Gunung Emas the presence and position of the plaintiffs. If they did not do so then it would not be unreasonable to say, that the defendants are the authors of their own misfortune.

IS THERE AN OVERRIDING PUBLIC INTEREST ELEMENT IN THIS CASE?

[55] The defendants say the injunction must be dissolved as arrangements have been made by Warisan Gunung Emas to rent out the entire 9 shophouses to the Maritime Agency and it is in the public interest that that tenancy should proceed because the functions performed by the Maritime Agency are for the benefit of the public as the agency is responsible for ensuring security in the country's maritime zone, including Sarawak waters. According to the defendants if the Maritime Agency is delayed in occupation of the 9 units of shophouses because renovations cannot be completed, it would be prejudicial to the public interest. In support of what the defendants say, they have referred me to the case of *Tenaga Nasional Bhd v Dolomite Industries Park Sdn Bhd* [2000] 1 CLJ 695 where Gopal Sri Ram JCA, speaking for the Court of Appeal said:

> That brings us to the question of remedy. The evidence on record shows that the offending pylon forms part of the National Grid for the conveyance of electricity. It is therefore clear that if a mandatory injunction is maintained there will be disruption of electricity supply in Peninsular Malaysia. It is not in the public interest that such a disruption should occur.

[56] I fully accept what was said in the above case, but what is the public interest in this case? In my view, none. The Maritime Agency is not a party to these proceedings, no injunction has been granted against the agency which prevents it from performing its duties in the country's maritime zone and Sarawak waters and there is no evidence before me from the agency to show that if it does not occupy the said shophouse it would be prevented from carrying out its functions and duties from the other 8 units of shophouses. I do not find the defendants' reliance on the public interest argument a very convincing one.

[57] Having taken all the above matters into the weighing I find that the plaintiffs would suffer greater injustice if injunctive relief is withheld in this case. The justice of the case requires that an injunction be issued to maintain the status quo between the parties pending the trial of this action. By status quo, I refer to the position obtained between the parties before the defendants took steps to terminate the plaintiffs' tenancy of the ground floor of the said shophouse.

[58] In the result I grant the plaintiffs' application for injunction in the terms applied for in prayers (ii), (iii), (iv), (v) and (vi) of their application. With regard to prayer (i), I will hear the parties on what its precise terms should be. I also award costs of this application to the plaintiffs.

Plaintiffs' application allowed with costs.

Reported by Loo Lai Mee